BEFORE THE

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2019-130-E

IN RE: Ecoplexus, Inc. Complainant, v. South Carolina Electric & Gas Company, Defendant.	)	**SOUTH CAROLINA ELECTRIC & GAS COMPANY'S RESPONSE IN OPPOSITION TO MOTION TO MAINTAIN STATUS QUO**

Pursuant to S.C. Code Ann. Regs. § 103-829(A) and other applicable rules of practice and procedure of the Public Service Commission of South Carolina ("Commission"), South Carolina Electric & Gas Company ("SCE&G") responds in opposition to Ecoplexus, Inc.'s ("Solar Developer") Motion to Maintain Status Quo filed on April 15, 2019, in the above-referenced docket (the "Motion"). For the reasons set forth below, SCE&G respectfully requests that the Motion be denied.

BACKGROUND

Solar Developer executed two interconnection agreements with SCE&G on February 11, 2019. Solar Developer proposes to construct a 74.9 MW[1] solar fueled Qualifying Facility, as defined by Federal Energy Regulatory Commission ("FERC") Regulation 18 C.F.R. § 292.204,

[1] Generation facilities under 75MWs are able to avoid Commission requirements to obtain a siting permit under S.C. Code Ann. § 58-33-110 and are able to avoid registering and complying with the North American Electric Corporation's mandatory reliability standards.

in Barnwell, South Carolina ("Barnwell PV1"). A copy of the interconnection agreement executed for Barnwell PV1 is attached hereto as Exhibit 1 and incorporated herein (the "Barnwell IA"). Solar Developer also proposes to construct a 71 MW solar fueled Qualifying Facility in Jackson, South Carolina ("Jackson PV1"). A copy of the interconnection agreement executed for Jackson PV1 is attached hereto as Exhibit 2 and incorporated herein (the "Jackson IA" and together with the Barnwell IA, the "IAs"). As memorialized in Appendix 4 of the IAs, Solar Developer agreed to a series of project milestones, which detail "critical" construction and financial deadlines and obligations "as agreed to by the Parties," including the first milestone payment under each of the IAs (collectively, the "First Milestone Payments").

The due dates for the First Milestone Payments are expressly detailed in the IAs and governed by Section 5.2.4 of the Commission-approved South Carolina Generator Interconnection Procedures, Forms and Agreements ("South Carolina Standard"). As discussed below, Section 5.2.4 of the Procedures of the South Carolina Standard mandates that the First Milestone Payments should have been submitted to SCE&G no later than April 16, 2019 (45 business days from the date Solar Developer executed the IAs), which is also the due date under the IAs. *See* Exhibit 1 at Appendix 4 and Exhibit 2 at Appendix 4. To date, SCE&G has not received either of the First Milestone Payments.

Solar Developer has yet to execute a Power Purchase Agreement ("PPA") for either project. On April 15, 2019, Solar Developer filed a Complaint alleging, among other things, that it has not been presented with its desired PPA. SCE&G disputes the allegations of the Complaint and will respond to the Complaint separately. With the Complaint, and in an attempt to avoid its well-settled obligations to make the First Milestone Payments under the IAs, Solar Developer filed the Motion only *one day before* the First Milestone Payments were due. Without any order from the Commission forgiving Solar Developer's obligations under the IAs, Solar

Developer subsequently refused to make the First Milestone Payments on April 16, 2019, as required by the IAs and the Procedures of the South Carolina Standard. As a result, and as further detailed below, Solar Developer's requests for interconnection for Barnwell PV1 and Jackson PV1 were deemed withdrawn pursuant to the terms of the IAs and Section 5.2.4 of the Procedures of the South Carolina Standard. As a result, the IAs were terminated immediately.[2] Solar Developer improperly seeks to have the Commission extend the IAs, create an exception to the Commission-approved Procedures of the South Carolina Standard, and grant an indefinite extension of Solar Developer's First Milestone Payments. Such requests should be denied.

ARGUMENT

I. The IAs terminated automatically pursuant to their terms.

The First Milestone Payments are governed by the terms of the IAs and the Procedures of the South Carolina Standard. The payment schedules for each IA appear on Appendix 4 therein. These schedules are set pursuant to Section 5.2.4 of the Procedures of the South Carolina Standard, as expressly described in Section 6.2 of the IAs: "A Party's obligations under this provision may be extended by agreement, except for timing for Payment of Financial Security-related requirements set forth in the Milestones, *which shall adhere to Section 5.2.4 of the [Procedures of the South Carolina Standard]*. (emphasis added). Section 5.2.4 of the Procedures of the South Carolina Standard makes clear that where payments are required prior to the "start of design, equipment procurement and construction" of the facilities and upgrades contemplated by the IAs—as were the First Milestone Payments —such payments must be submitted within 45 business days of the date Solar Developer signs the IAs. If such payments are not received within that window, the requests for interconnection must be "deemed withdrawn."

[2] While Solar Developer styles this as a motion to maintain the status quo, maintaining the status quo "maintains" the termination of its IAs for failure to pay the required First Milestone Payments on or before April 16, 2019.

Solar Developer signed each IA on February 11, 2019. This means that the First Milestone Payments must have been submitted by or before April 16, 2019—the expiration of the 45 business-day window and the due date specified in the IAs. Appendix 2 expressly reiterates the failure to comply with Section 6.2 of the IAs by noting that failure to make milestone payments within the agreed-upon timeframes can "result in the termination of the Generator Interconnection Agreement and the withdrawal of the Generator Interconnection Application."

No payment was made on or before April 16, 2019, for either project, and there were no modifications of the IAs or orders from the Commission allowing for the failure to tender the First Milestone Payments. Therefore, the request for interconnection for Barnwell PV1 and Jackson PV1 were deemed withdrawn automatically, pursuant to the IAs and Section 5.2.4 of the Procedures of the South Carolina Standard. As a result, the IAs were immediately terminated. SCE&G sent two notices acknowledging such terminations on April 17, 2019.

To avoid its obligations under the Procedures of the South Carolina Standard and the IAs, Solar Developer claims that it is no longer bound by those obligations because it filed the Motion with the Commission. However, simply filing the Motion, a day before payment was owed, neither suspends Solar Developer's obligations under the Procedures of the South Carolina Standard nor extends the deadline for the First Milestone Payments. Indeed, a party similarly seeking a motion for a preliminary injunction does not automatically secure the injunction by filing, but is only able to secure the requested relief through later order of the court.[3]

The First Milestone Payments are not contingent on any act, such as securing financing,

[3] The comparison to injunctive relief is appropriate, as a Motion to Maintain Status Quo is essentially a motion for a preliminary injunction using different terms. The South Carolina Supreme Court has repeatedly stated "[t]he sole purpose of an injunction is to preserve the status quo." *See Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973).

and are not tolled by simply filing the Motion. There is simply no avenue within the IAs for such a failure or delay. Through the clear language of the IAs and the South Carolina Standard, the agreements are terminated and withdrawn.

II. The Motion does not provide a basis for relief.

Furthermore, the Motion is deficient in its own right because it does not present "a concise and cogent statement of the facts" to the Commission or otherwise provide appropriate grounds to grant the requested relief. *See* S.C. Code Ann. Regs. § 103-829; *see also* South Carolina Rules of Civil Procedure ("S.C.R.C.P.") § 7(b)(1) (motions should "state with particularity the grounds therefor, and . . . the relief or order sought.").

Other than Solar Developer's apparent misunderstanding of the terms of the IAs with respect to the First Milestone Payments, the only other proffered support in the Motion to indefinitely extend the terms of the IAs is a blanket allegation that SCE&G acted in a discriminatory manner and then engaged in "additional violations of [PURPA]." *See* Motion to Maintain Status Quo at 2, filed on April 15, 2019. SCE&G denies that it has acted in a discriminatory manner or that the First Milestone Payments amounts are inaccurate. Solar Developer has not provided any evidence of the alleged discrimination or improper milestone payment calculations.

Solar Developer is a sophisticated party experienced in solar development. Headquartered in San Francisco, California and incorporated in 2008, Solar Developer has developed more than 80 solar facilities worldwide. Solar Developer has corresponded with SCE&G about these two projects since the summer of 2017. In fact, back in the summer of 2018, Solar Developer corresponded with SCE&G multiple times regarding its desire to be subject to the FERC interconnection rules and procedures rather than the jurisdiction of the Commission. SCE&G explained that the projects should be in the state interconnection queue and processed

under the Procedures of the South Carolina Standard.

Indeed, Solar Developer is well-aware of the regulatory avenues to resolve disputes during the negotiation process. For example, on July 30, 2018, SCE&G offered to host a call with attorneys for both sides in an attempt to resolve a queue dispute related to another of Solar Developer's projects that is not a part of this docket. In response, Solar Developer advised SCE&G that it had already notified the Office of Regulatory Staff about the dispute. This response showcases Solar Developer's sophistication and experience in navigating precisely these types of matters before filing a Complaint.

Furthermore, Solar Developer is also familiar with both the FERC interconnection rules and the Procedures of the South Carolina Standard. If Solar Developer had legitimate concerns about discriminatory practices or the methodology used to determine its interconnection costs, it could have raised those concerns with the Commission when the facilities studies were performed, or at the very least prior to executing its IAs. SCE&G first provided Solar Developer with a draft version of Appendix 4 on January 4, 2019, prior to the construction meeting.[4] The draft version provided the milestone payment dates. Further, on April 1, 2019, Solar Developer asked SCE&G about the possibility of extending the date for the Milestone Payments.[5] At that time, SCE&G explained that it could not extend the payment date beyond the requirements of Section 5.2.4 of the Procedures of the South Carolina Standard.[6] Solar developer acknowledged SCE&G's response and the requirements of the South Carolina Standard.[7]

[4] E-mail from John Cole of SCE&G addressed to a working group that included Shawn Grimsley of Solar Developer (January 4, 2019, 1:57PM EST) (attached as Exhibit 3).
[5] E-mail from Michael Wallace of Solar Developer to a working group that included Matthew Hammond of SCE&G (April 1, 2019, 5:23PM EST) (attached as Exhibit 4).
[6] E-mail from Matthew Hammond of SCE&G to a working group that included Michael Wallace of Solar Developer (April 3, 2019, 9:54AM EST) (attached as Exhibit 4).
[7] E-mail from Michael Wallace of Solar Developer to a working group that included Matthew Hammond of SCE&G (April 3, 2019, 10:20AM EST) (attached as Exhibit 4).

Solar Developer's past conduct with SCE&G is evidence that Solar Developer is quick to seek regulatory assistance. Prior to executing the IAs, Solar Developer was aware of the due date, the amounts of the First Milestone Payments, and the requirements of Section 5.2.4. Presumably, Solar Developer would have also been aware of the alleged discriminatory practices of which it now complains. However, Solar Developer proceeded to enter into the IAs and did not seek regulatory assistance until the day before the First Milestone Payments were due.

Furthermore, the First Milestone Payments represent only half the interconnection costs that Solar Developer is obligated to pay under the IAs. Solar Developer faced no harm in simply making the First Milestone Payments, even if it believed the total amount to be inaccurate. Solar Developer could have filed the Complaint and proceeded to make the First Milestone Payments on time. If the Commission then ruled in its favor, the First Milestone Payments, or any portion thereof, could have simply been refunded.

Had Solar Developer made the First Milestone Payments, Solar Developer would have had ample time to get resolution of its interconnection claims before the deadline of the next milestone payments under the IAs—not due until 2022 for both projects. Instead, Solar Developer filed the Motion a day before the First Milestone Payments were due, refused to fulfill its obligations under the IAs it negotiated, and attempted to convince the Commission that it should ignore the requirements of Section 5.2.4 and intervene to unravel the very obligations that Solar Developer—a sophisticated party—negotiated. This argument strains logic for the very reasons outlined above. Granting the Motion is simply not the proper avenue through which to address Solar Developer's claims.

III. Granting the Motion will harm other interconnection customers.

The IAs, and the milestone schedules therein, serve a critical purpose. They provide certainty for other projects in the queue by preventing disparate treatment and reducing queue

congestion through express milestones. Granting the Motion would indefinitely extend the deadline for the First Milestone Payments by creating an exception to the Commission-approved Procedures of the South Carolina Standard and ignoring the terms of the IAs. The FERC noted that such extensions might present harm to later-queued interconnection customers in the form of uncertainty, cascading restudies, and shifted costs necessitated if the project is removed from the queue at a later date. *See, e.g., Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,198, 62,108 (2014) (advocating for the goal of "discouraging speculative or unviable projects from entering the queue [and] getting projects that are not making progress toward commercial operation out of the queue"). For these reasons, the FERC approved termination of interconnection agreements where the interconnection customer failed to make interconnection payments. *See Pacific Gas & Electric Co.*, 146 FERC ¶ 61,120, 61,518 (2014); *Midwest Independent Transmission System Operator, Inc.*, 143 FERC ¶ 61,709, 61,713 (2013).

SCE&G administers its queue in a non-discriminatory manner in accordance with the Procedures of the South Carolina Standard. Solar Developer is not uniquely impacted and does not allege any special or unique circumstances which justify disparate treatment from other similarly-situated developers. If the Commission were to grant the Motion, it would be creating an exception to its own set of uniform rules and procedures, and the well over 50 other active projects in SCE&G's queue would have valid grounds to complain of discriminatory and preferential treatment. Furthermore, granting the Motion would create the opportunity for other projects in the queue to toll the obligations under their respective interconnection agreements simply by submitting a filing with the Commission. This would put the entire queue in limbo, and render the certainty meant to be provided by the milestone schedules meaningless.

CONCLUSION

By denying the Motion, the Commission would provide reassurance for utilities in South

Carolina, as well as other projects in the queue, that the well-settled Procedures of the South Carolina Standard remain in full force. For the aforementioned reasons, SCE&G respectfully asks the Commission to deny the Motion.

Respectfully Submitted,

/s/ J. Ashley Cooper

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Cayce, South Carolina
April 24, 2019

BEFORE THE

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2019-130-E

IN RE:	)	
Ecoplexus, Inc.	)	
Complainant,	)	
v.	)	CERTIFICATE OF SERVICE
South Carolina Electric & Gas Company,	)	
Defendant.	)	

This is to certify that I, Ashley Cooper, have this day caused to be served upon the person named below the ***South Carolina Electric & Gas Company's Response in Opposition to Motion to Maintain Status Quo*** by electronic mail and by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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/s/ J. Ashley Cooper

This 24th day of April, 2019